Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

SEAN COFFEY,

Petitioner,

versus

VICTOR R. MCNAIR AND TRÉ K. MCNAIR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

1. Whether, in a case alleging the use of constitutionally excessive force by a police officer, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.

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PETITION FOR A WRIT OF CERTIORARI

Attorney Timothy J. Yanacheck, on behalf of Sean Coffey, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, la - 8a) is reported at 234 F.3d 352 (7th Cir. 2000). The opinion of the district court (App., *infra*, 9a - 15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF CASE

1. Respondents Victor R. McNair and Tre' K. McNair brought Fourth Amendment claims against a City of Fitchburg (Wisconsin) police officer, petitioner Sean Coffey. Both respondents claimed that petitioner used excessive force against them. Respondent Tre' K. McNair also claimed that petitioner had unconstitutionally detained him, while respondent Victor R. McNair did not dispute the officer's right to detain him.

2. The relevant facts were, for the most part, not disputed.[1]

On December 20, 1997, petitioner was on routine patrol in a high-crime area of his community. Petitioner was a "neighborhood officer." His beat was that portion of the city where the subject incident began. In addition to his regular patrol duties, as neighborhood officer, petitioner worked more closely with the community to try to combat some of the problems arising within a smaller portion of the city than most officers deal with. Based on both personal experience and common knowledge among law enforcement officers, petitioner knew that a lot of drug activity took place in the neighborhood.

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[1] Because the case arises after a verdict favorable to respondents on their excessive-force claims, we present any disputed facts in the light most favorable to respondents, as those facts may pertain to the excessive force claims. The unconstitutional-detention claim, however, was resolved in favor of petitioner by the jury, and so we present any disputed facts for that claim in the light most favorable to the petitioner.

Petitioner observed a group of five or six people standing next to the car which later became involved in this incident. The individuals were in a fairly close-knit group, and talked for just a few minutes before separating. A number of the people then walked towards some apartment buildings, one of which was known to police to be a drug house. The other individuals (the respondents) left in the car.

The short-term contact witnessed by petitioner in that location was indicative of drug activity, where people come into the neighborhood, make brief contact with other people, and conduct a drug transaction. Typically, the group then separates with the seller staying in the neighborhood and the buyers leaving.

His attention divided, petitioner thought that three individuals (rather than just the two respondents) had left in the car. He continued to believe that there was a third occupant in the car until the car was eventually stopped and searched.

Petitioner was well aware that he needed probable cause (such as evidence of a traffic violation) to stop the car. Petitioner suspected that the occupants of the car were drug dealers, and he wished to stop the car to check it for drugs. He asked his dispatcher to check the car's license plate number. Petitioner was advised by radio dispatch that the registration of the car was suspended because of an unpaid traffic citation. Operation of a motor vehicle in Wisconsin with a suspended registration is a traffic violation. Wis. Stat. § 341.03(1). He intended to ask the respondents for their consent to search the car, but absent their consent, he would not have performed the search.

Petitioner attempted to get the car to stop by signaling with red lights and siren, but the car drove on for about a mile. Failing to stop after receiving a visual or audible signal from an officer or marked police vehicle is a violation of another Wisconsin traffic regulation. Wis. Stat. § 346.04(3).

Petitioner thought it was suspicious that the car did not stop, and he did not believe there was a legitimate or excusable reason for this. The facts known to petitioner were that respondents were leaving an area of town known for high drug use after a brief meeting outside a drug house, typical of a drug sale, and he saw the heads of only two occupants in the car, whereas he believed three had entered the car. Accordingly, petitioner decided to use the procedure called a "high-risk vehicle contact."[2]

This procedure — from threat assessment to the conclusion of the incident — was consistent with the training petitioner had received both at the State-certified police academy he attended at Waukesha County Technical College and through field training conducted by his own police department.

The car in which respondents were riding eventually stopped at a convenience store gas station. Petitioner exited his squad car, stood behind the driver's door, pointed his gun at the car, and ordered the occupants to exit the car with their hands in view. Seven other police units arrived. Some of those officers also stood behind the squad car doors with guns drawn and aimed at respondents' car.

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[2] The term "high-risk" refers to the type of incident giving rise to the use of the procedure, not to any risk inherent in the procedure itself. The procedure itself is designed to ensure maximum safety by imposing strict control on all participants.

Respondents got out of their car as ordered. They were handcuffed and patted down. Respondent Tre' K. McNair was detained for about 25 minutes and released without any charges issued against him. Respondent Victor R. McNair was issued citations for operating a vehicle after suspension of registration and failing to obey an officer's signal; he was released as soon as the citations were written, which was in less than an hour.

No one sustained any physical injuries in the incident. No physical force (in terms of hitting, grappling or the like) or abusive language was used.

At trial, respondents did not call any witnesses to dispute that petitioner had acted according to his training. Respondents did not even cross-examine petitioner's field training supervisor, who had confirmed petitioner's testimony on this point.

REASONS FOR GRANTING THE PETITION

This Court has already granted the petition for a writ of certiorari in *Saucier v. Katz*, cert. granted, 531 U.S. _____, 121 S. Ct. 480, 148 L.Ed.2d 454 (2000) (No. 99-1977), to resolve whether, in an excessive force case under the Fourth Amendment, the same legal standard governs both the question of qualified immunity and the question of reasonableness under the Fourth Amendment itself. This case presents the same issue. For the same reason as the officer in *Saucier* was denied qualified immunity, petitioner has been denied qualified immunity.

In conflict with the decisions of other circuits, the court of appeals below holds that a factual finding of unreasonable force precludes qualified immunity. App.,

infra, 4a - 5a. The Seventh Circuit's refusal to apply qualified immunity to the facts of this case, moreover, vitiates prior decisions of this Court by contradicting the important public policy considerations underpinning those decisions, including the safety of police officers, arrestees, and other members of the public. Review is therefore warranted.

The first reason for granting this petition — that the court of appeals refused to apply qualified immunity — has been ably and thoroughly discussed in the petition and briefs in the *Saucier* case. We expect that this Court's decision in *Saucier* will settle the conflict among the circuits and, most likely, determine whether the court of appeals below decided this case correctly. In the meantime, however, petitioner stands vulnerable to the adverse judgment recently entered against him. This Court's decision in *Saucier* may come too late to prevent manifest injustice to petitioner unless this Court grants this petition.

The second reason for granting this petition — that the decision in the court of appeals vitiates prior holdings of this Court — calls for additional consideration by this Court.

This Court has long recognized the life-and-death realities for police officers who are required by our society to enforce narcotics laws. "In the narcotics business, 'firearms are as much "tools of the trade" as are most commonly recognized articles of narcotics paraphernalia'." *Ybarra v. Illinois*, 441 U.S. 85, 106 (1979) (quoting *U.S. v. Oates*, 560 F.2d 45, 62 (2nd Cir. 1977)).

The court of appeals below paid only lip service to petitioner's potential danger with this brief reference: "Neither McNair was roughed up, and although the officers' histrionics seem a bit much for a traffic stop, we do not deprecate the risk that confronts the police in these

situations." App., *infra,* 3a. Yet the court of appeals did just that — deprecate the risk to the officers by essentially ignoring it. The court of appeals viewed the facts of the case exactly as this Court has told us not to do, by judging the reasonableness of a particular use of force "with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The court of appeals' decision recites many facts which were not known to petitioner when he elected to use the high-risk vehicle contact procedure. This shortcoming, in and of itself, may not be sufficient to warrant a writ of certiorari from this Court. It does underscore, however, the necessity that courts be allowed to review the proven facts of the case, survey the undulating landscape of judicial precedents to determine which rights were clearly established, and then make a dispassionate decision of law. The district court below did just that and applied qualified immunity to petitioner's action. The court of appeals then reversed that decision, asserting the jury verdict rendered the court's analysis meaningless.

The court of appeals below and other circuits identified in the *Saucier* petition and briefs have held that courts are powerless to apply qualified immunity to Fourth Amendment cases where the fact-finder found a violation. We submit that this cannot be so.

Petitioner's situation provides an excellent example of why the circuits need to be reinstructed on the value — indeed, the practical necessity — of granting qualified immunity despite a jury's verdict.

We have only to go back as far as this Court's decision in the Fourth Amendment case of *Wilson v. Layne*, 526 U.S. 603 (1999), a case relied upon by the district court below. *Wilson* reminds us that "the right allegedly violated

must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* at 615, citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). This Court then searched for published law on the particular police practice involved in the case, media ride-alongs. Media ride-alongs were apparently a common police practice. *Id.* at 616. This Court noted that "in 1992 there were no judicial opinions holding that this practice became unlawful when it entered a home." *Id.* The appropriate level of specificity, as demonstrated by this Court in *Wilson*, is quite specific indeed. Even the court of appeals below in this case has recognized in some of its decisions that, "[t]he right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful." *Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987) (quoting *Azeez v. Fairman*, 792 F.2d 1296, 1301 (7th Cir. 1986)); *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993).

What is more, in *Wilson*, this Court went on to say that it was "important to our conclusion" that the United States marshals in the case relied on an official policy which "explicitly contemplated" the conduct for which they were sued. *Id.* at 617.

We turn then to petitioner, Officer Sean Coffey, who found himself in a situation where he was "forced to make split-second judgments — in circumstances that are tense, uncertain and rapidly evolving — about the amount of force that is necessary in a particular situation," quoting from *Graham*, 490 U.S. at 397. Just like the marshals in *Wilson*, petitioner also acted in accordance with an explicit policy from his higher-ups. By choosing to use the high-risk vehicle contact procedure when faced with the situation at hand, petitioner did exactly as he was trained to do. Whether constitutional or unconstitutional in hindsight, the State of

Wisconsin had provided that very training at one of its state-certified police academies.

Also significant for the purpose of qualified immunity, petitioner's use of the high-risk vehicle contact procedure was consistent with controlling authority in petitioner's jurisdiction, that is, Wisconsin and the Seventh Circuit. In granting our Rule 59(e) motion, the district court below alluded to the two closely-analogous cases discussed below which were "on the books" at the time of the incident.

The highest state court in Wisconsin decided *State v. Richardson*, 156 Wis. 2d 128 (1990). In that case, officers responded to an anonymous tip about Richardson. (In contrast, petitioner Officer Coffey was relying on his personal observations and inferences therefrom, not merely on an anonymous tip.) Like petitioner, the officers in *Richardson* suspected that Richardson's motive was to traffic illegal drugs. Upon reasonable suspicion, the officers performed an investigative stop of Richardson. They did so by using "a felony-type traffic stop" procedure, "meaning that the situation was considered high risk and that weapons would be drawn. A roadblock situation was set." The vehicle was stopped and its occupants, including Richardson, were removed. Richardson was searched. The search of Richardson's person revealed that he was in possession of cocaine.

The Wisconsin Supreme Court approved of the officers' actions. They determined it was a valid investigatory stop. Further, the court had this to say on the specific safety features of a procedure similar to one used by petitioner:

> The officers were approaching the car at night. Based on the tip, they considered the

> situation to be a high risk felony stop. Although the anonymous tipster did not indicate that the defendant would be armed, he did indicate that the defendant had a prior drug related conviction. Several cases have found that drug dealers and weapons go hand in hand, thus warranting a *Terry* frisk for weapons. See, *United States v. Pajari*, 715 F.2d 1378 (8th Cir. 1983); *United States v. Post*, 607 F.2d 847 (9th Cir. 1979); *United States v. Oates*, 560 F.2d 45 (2nd Cir. 1977). Under the totality of the circumstances, we conclude that the anonymous tip in this case and the verification by police observation of its innocent details provided police with reasonable suspicion to not only make an investigative stop of the defendant's vehicle, but also to order him out of the car, and to pat him down for weapons.

Id. at 143-44.

The officers' drawing of their weapons, pointing them at the occupants of the car, preventing their departure by a roadblock, and the like were not criticized by the Wisconsin Supreme Court. That the officers' actions were constitutional was decided as a matter of law.

Consequently, the lessons that a reasonable police officer such as petitioner would have taken from the case of *State v. Richardson* were (1) that he could legally use the high-risk vehicle contact procedure (even if he had no more than "reasonable suspicion"), (2) that personal observations of only "innocent" behavior can be part of the totality of the circumstances upon which an officer bases his judgments,

and (3) that a general fear of weapons on suspected drug-traffickers is a legitimate basis for an officer to draw his weapon.

Since the Wisconsin Supreme Court's decision would lead a reasonably diligent police officer to mold his conduct accordingly, petitioner should thus be protected from liability by qualified immunity.

Another case decided within our Seventh Circuit, *Cuautle v. Tone*, 851 F. Supp. 1236 (C.D. Ill. 1994), involved a "full felony stop," a procedure taught and used by the Illinois State Patrol. The court's description bears a resemblance to the high-risk vehicle contact procedure used by petitioner.

Trooper Tone, the defendant, with the assistance of at least two other troopers in patrol cars, initiated a "full felony stop" of the plaintiff Cuautle's vehicle. Trooper Tone, as well as the other officers, approached Cuautle's vehicle with their weapons drawn. Trooper Tone ordered Cuautle to exit his vehicle. The stop was made in the first place because Trooper Tone had observed Cuautle commit two traffic violations; this was held sufficient for purposes of probable cause.

The felony stop procedures were taught and used by the Illinois State Police. The procedures were "not routinely authorized when making misdemeanor traffic stops *absent some exigent circumstances which would implicate concerns for the safety of the officer or another person.*" (Emphasis supplied.) *Id.* at 1240. Such "exigent circumstances" for petitioner Officer Coffey included the apparent connection between the plaintiffs and a drug house, the dangers inherent in dealing with suspected drug-traffickers, the plaintiffs'

failure to stop their car when signaled to do so, and a third occupant's apparently concealing himself in the plaintiffs' car.

The court thus approved the "felony stop procedures" and would have granted summary judgment in favor of Trooper Tone but for a genuine issue of material fact raised by Cuautle's testimony. (Cuautle had sworn that Trooper Tone used abusive language, grabbed Cuautle, put a gun to Cuautle's head, threatened to kill Cuautle, wrenched Cuautle's arm, threw Cuautle across the hood of his vehicle, and punched Cuautle repeatedly. In this case, respondents agree that petitioner was not guilty of any such misconduct.)

Consequently, the lessons that a reasonable police officer such as petitioner would have taken from the case of *Cuautle v. Tone* was that he could legally (1) use the high-risk vehicle contact procedure, (2) if the circumstances raised concerns for his safety and (3) if he did not abuse the plaintiffs as by unnecessarily threatening them, putting his gun to their heads, punching them, and so on.

The decision of the court of appeals below denies public officials such as petitioner an essential protection from liability, a protection derived from sound public policy. The court of appeals would let the entire matter end with the jury's verdict in a Fourth Amendment case. However, the jury never heard about the *Richardson* case, the *Cuautle* case, or any other judicial precedents justifying petitioner's reasonable belief that he was acting legally.

This Court has made clear that, for "government officials performing discretionary functions," qualified immunity should be invoked on account of "the need to

protect officials who are required to exercise their discretion." *Butz v. Economou*, 438 U.S. 478, 506 (1978).

Related to the need to protect public officials who are required to exercise their discretion is the "public interest in encouraging the vigorous exercise of official authority." *Id.*

Petitioner could have chosen to ignore the brief meeting he witnessed outside the drug house. He could have ignored the opportunity to check respondents' car license plate for possible violations. He could have ignored the fact that respondents continued to drive on their merry way for a mile without pulling over to the side of the highway as required by law. He could have ignored the well-known risk to law enforcement officers that drug dealers are frequently armed and should be assumed so. In fact, he could have ignored this entire situation and sat warmly and securely in the squad car that night. But he did not. Instead, petitioner acted affirmatively to try to protect the citizens of the community in which he was the neighborhood officer. The doctrine of qualified immunity is intended to encourage that kind of vigorous — yet safe — exercise of official authority.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 00-1139

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Victor R. McNair and Tré K. McNair,
Plaintiffs-Appellants,

v.

Sean Coffey, Defendant-Appellee.

November 1, 2000, Argued

December 8, 2000, Decided

COUNSEL:
For VICTOR R. MCNAIR, TRE K. MCNAIR, Plaintiffs - Appellants: Jeffrey P. Sweetland, SHNEIDMAN, MYERS, DOWLING & BLUMENFIELD, Milwaukee, WI USA.

For SEAN COFFEY, Defendant - Appellee: Timothy J. Yanacheck, STILP & COTTON, Madison, WI USA.

JUDGES:
Before Cudahy, Coffey, and Easterbrook, Circuit Judges.

OPINION BY:
Easterbrook

OPINION:

Easterbrook, *Circuit Judge*. A jury awarded brothers Victor and Tré McNair $ 5,000 apiece to compensate them for the fright and indignity they suffered when officer Sean

Coffey pulled over their car and, with the aid of seven other officers (a total of eight squad cars), arrested them at gunpoint for the offense of not paying parking tickets. The jury concluded that, by treating these scofflaws as if they were armed bank robbers apprehended after a high speed chase, officer Coffey used excessive force and thus violated the fourth amendment, as interpreted in *Graham v. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)*, and *Lester v. Chicago, 830 F.2d 706 (7th Cir. 1987)*.

Taken in the light most favorable to the verdict, as it must be, the evidence shows that the McNairs were driving peaceably to church one evening when officer Coffey put on his lights to signal them to stop. Coffey had adequate reason to do this: a check showed that the license plate had been suspended for nonpayment of parking fines. Although Coffey was not interested in this offense but wanted instead to look into the possibility of drugs, probable cause for the stop was not undercut by Coffey's desire to investigate a different offense. *Whren v. United States, 517 U.S. 806, 811-13, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996)*. Driving in a rough neighborhood, the McNairs were hesitant to stop on a poorly lighted street. So they did not immediately pull over but drove slowly to a well illuminated gas station, where they pulled off the road and waited for the police car. Officer Coffey meanwhile had radioed his dispatcher that a chase was in progress and called for armed backup. The McNairs stopped about a mile from the place where Coffey turned on the patrol car's flashing lights. The price of this delay was that the police treated the McNairs like desperadoes who had been firing tommy guns out the windows.

According to Coffey, this was a "high risk traffic stop"--not only because of the neighborhood but also because the McNairs did not stop immediately and the officer was not sure how many persons were in the car. Coffey's response was to crouch behind the door of his squad car, point a semiautomatic pistol at the McNairs, and demand over a

loudspeaker that they put their hands against the inside roof of the car. They complied without making any suspicious move. When other patrol cars had arrived, and at least four more officers had the McNairs in their sights, Coffey ordered them to get out with their hands in the air; again they complied peaceably. Both McNairs were handcuffed and arrested--a step that enabled Coffey to search their persons and their car. (He found nothing unlawful.) Tr', who had been the passenger, was released after about 25 minutes, and Victor after an hour. Both were shaken by the experience.

Neither McNair was roughed up, and although the officers' histrionics seem a bit much for a traffic stop, we do not deprecate the risk that confronts the police in these situations. Perhaps Coffey could have argued that an excessive *display* of force must be distinguished from an excessive *use* of force. See *Gumz v. Morrissette, 772 F.2d 1395, 1408-09 (7th Cir. 1985)* (concurring opinion). But he did not move for judgment under Fed. R. Civ. P. 50 either at the close of the evidence or after the verdict. Instead he accepted the jury's conclusion that the conduct violated the fourth amendment and argued that, even so, he is entitled to qualified immunity from civil liability. With this contention the district court agreed, setting aside the verdict and entering judgment for Coffey. The judge relied principally on *Wilson v. Layne, 526 U.S. 603, 614-18, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999),* one of many cases implementing the holding of *Anderson v. Creighton, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987),* that until the constitutional right has been made specific enough that a reasonable officer would be aware of his obligations, immunity offers protection.

Public officials must act in the shadow of legal uncertainty. Unlike private actors, who can retire from the fray while legal debate persists, police must protect the public (and themselves) as best they can while coping with complex bodies of law that not only change but also often leave important subjects unresolved for extended periods. When

the law is in flux, or when the only applicable norm is a multi-factor balancing test incapable of predictable application, prospective relief is used in lieu of damages. See *Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990)* (en banc); *Greenberg v. Kmetko, 840 F.2d 467 (7th Cir. 1988)* (en banc).

For many years the analysis of excessive-force claims was beset by legal uncertainty. Some courts analyzed these claims under the fourth amendment, some under the fifth (and, if under the fifth, some for "conscience-shocking" conduct, a standard very hard to pin down in practice). Some courts used a subjective approach, others an objective one. Uncertainty about the legal standard ended, however, with the Supreme Court's opinion in *Graham*, which adopts an objective approach under the fourth amendment. There may still be uncertainty in the application of that standard to particular situations, but this is not the kind of legal uncertainty that *Anderson* and *Wilson* discuss. It is enough that the rule of law be specific in its relation to the facts--and *Graham* makes the norm as clear as the judiciary can achieve, more specific than rules of tort law under which juries regularly award large damages against surgeons and auto manufacturers.

Still, Coffey insists, he is entitled to immunity unless a reasonable officer in his position would have known that the *Graham* standard labeled his conduct excessive. Six courts of appeals agree with this proposition. *Napier v. Windham, 187 F.3d 177, 188 (1st Cir. 1999); Finnegan v. Fountain, 915 F.2d 817, 822-23 (2d Cir. 1990); Slattery v. Rizzo, 939 F.2d 213, 215-16 (4th Cir. 1991); Brown v. Glossip, 878 F.2d 871, 873-74 (5th Cir. 1989); Landrum v. Moats, 576 F.2d 1320, 1327-28 (8th Cir. 1978); Gold v. Miami, 121 F.3d 1442, 1446 (11th Cir. 1997).* We are not among these courts, however. See *Frazell v. Flanigan, 102 F.3d 877 (7th Cir. 1996); Titran v. Ackman, 893 F.2d 145 (7th Cir. 1990).* *Frazell* holds that "once a jury has determined under the

Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful." *102 F.3d at 886-87.* This conclusion has the support of at least four other circuits. *Holt v. Artis, 843 F.2d 242, 246 (6th Cir. 1988); Katz v. United States, 194 F.3d 962 (9th Cir. 1999),* cert. granted under the name *Saucier v. Katz* (No. 99-1977, Nov. 11, 2000); *Street v. Parham, 929 F.2d 537, 540, 541 n.2 (10th Cir. 1991); Scott v. District of Columbia, 322 U.S. App. D.C. 75, 101 F.3d 748, 759 (D.C. Cir. 1996).* The Supreme Court may resolve this conflict in *Saucier;* unless superseded by higher authority, however, the position articulated in *Frazell* prevails in this circuit.

This is not to say that qualified immunity is inconceivable in an excessive-force case. See *Ellis v. Wynalda, 999 F.2d 243, 246 n.2 (7th Cir. 1993).* Judges rather than juries resolve immunity defenses, and a judge might conclude before trial--indeed, before discovery, see *Hunter v. Bryant, 502 U.S. 224, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991)*--that the circumstances would not have alerted a reasonable officer that his acts could be deemed an application of excessive force. Moreover, whenever the legal status of a course of conduct is uncertain, damages are inappropriate. Thus if officer Coffey had argued that fright and dismay (= assault), as opposed to unjustified physical contact (= battery), cannot support an excessive-force claim, and if the answer to that contention were legally uncertain, then immunity would be available. That's the upshot of *Wilson* and *Layne,* where legal uncertainty about the *meaning* of the fourth amendment prevailed when the officers acted. But, as we have said, officer Coffey did not make such an argument in the district court and does not advance it now. He takes all legal principles as settled and argues that he is immune from damages liability nonetheless. That seems to us unsound, and not just because *Frazell* precludes it.

To say that a public official is not exposed to damages even when all legal issues were authoritatively resolved before the conduct occurred would be to make a substantial change in the scope of liability under *42 U.S.C. § 1983*. Cf. *Johnson v. Jones, 515 U.S. 304, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995)* (emphasizing the link between immunity and legal uncertainty). Officer Coffey's argument for immunity in factually (as opposed to legally) close cases is fundamentally a request to increase the plaintiff's burden of proof--to insist that the plaintiff show a violation not by a preponderance of the evidence (where the plaintiff can win a close case) but by clear and convincing evidence (where all close cases go to the defendant), perhaps even proof beyond a reasonable doubt. Only then, the argument goes, can we be *sure* that the public official should have recognized the culpability of his conduct. Yet a § 1983 case is not a criminal prosecution, and the preponderance standard applies to civil claims of all sorts. See *Grogan v. Garner, 498 U.S. 279, 112 L. Ed. 2d 755, 111 S. Ct. 654 (1991); Herman & MacLean v. Huddleston, 459 U.S. 375, 390, 74 L. Ed. 2d 548, 103 S. Ct. 683 (1983)*. It should not be changed covertly, through an immunity defense that imposes a heightened standard of proof. Cf. *Crawford-El v. Britton, 523 U.S. 574, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998); Leatherman v. Tarrant County, 507 U.S. 163, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993)*. Moreover, the formula for immunity officer Coffey seeks to use--whether a reasonable person would have *realized* that his conduct violates established legal standards--reintroduces the element of subjectivity that *Graham* deliberately removed. An immunity defense along these lines would be equivalent to saying that a plaintiff cannot prevail without establishing *both* objective and subjective unreasonableness. Undermining the holding of *Graham* in this fashion has little to recommend it.

Let us never forget that immunity in § 1983 cases is a judicial invention. Congress provided for liability in absolute

terms. Public officials who violate the Constitution or laws must pay; immunity is anti-textual. The justification for immunity is that the scope of liability has grown like topsy since 1871, when § 1983 was enacted, and that to carry out what Congress must have meant a court may depart from what Congress said. That's a treacherous path for any judge to take, though history may provide a map. The Supreme Court has justified immunity doctrines as approximating of the scope of public-official liability that prevailed when § 1983 was enacted. See *Richardson v. McKnight, 521 U.S. 399, 402-07, 138 L. Ed. 2d 540, 117 S. Ct. 2100 (1997); Wyatt v. Cole, 504 U.S. 158, 164, 118 L. Ed. 2d 504, 112 S. Ct. 1827 (1992).* Fair enough in many parts of the law, but not when dealing with the fourth amendment. Until this century police faced absolute liability (in trespass or battery) for their acts; probable cause and reasonableness were defenses, and immunity (on top of these defenses) was unheard of. A principal function of the fourth amendment was to protect private parties from overreaching by the police by limiting the availability of advance judicial approval (that is, of a warrant) as a defense, to ensure that citizens could recover unless arresting or searching officers could establish the reasonableness of their conduct. See Telford Taylor, *Two Studies in Constitutional Interpretation 24-47 (1969); Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles* 3-17, 40-43 (1997). All the great early opinions defining the scope of freedom from official intrusion resolve damages claims, without a hint that if the officers behaved unreasonably they might still be immune from liability. Thus a general doctrine of official immunity, independent of legal uncertainty, is not only anti-textual but also anti-historical in fourth amendment cases. Perhaps the judiciary would do well to rely more on damages liability and less on the exclusionary rule to enforce the fourth amendment--for damages go to all victims of improper official conduct, while exclusion benefits only the guilty and offers no solace to persons such as the McNairs. We are reluctant to follow an approach that further

weakens damages as a deterrent and leads to greater reliance on the exclusionary rule.

The judgment is reversed, and the case is remanded with instructions to enter judgment on the jury's verdict.

99-C-163-S

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

VICTOR R. McNAIR and
TRE McNAIR,
Plaintiffs,

v.

SEAN COFFEY,
Defendant.

MEMORANDUM and ORDER

On November 5, 1999 judgment was entered in the above entitled matter upon a jury verdict in favor of plaintiff Victor R. McNair against defendant Sean Coffey in the amount of $5,000.00 and costs and in favor of Tre McNair against defendant Sean Coffey in the amount of $5,000.00 and costs. On November 12, 1999 defendant Coffey moved to alter or amend said judgment to dismiss plaintiffs' complaint on the basis that defendant is not liable because he is entitled to qualified immunity. This motion has been fully briefed and is ready for decision.

On November 19, 1999 plaintiffs moved for attorney fees and costs pursuant to 42 U.S.C. § 1988. This motion has also been fully briefed and is ready for decision. In addition, defendant's motion for costs incurred by the filing of plaintiffs' amended complaint on September 29, 1999 is ready for decision.

MEMORANDUM

The Court first addresses defendant's motion to amend the judgment to dismiss plaintiffs' complaint on the basis of defendant's qualified immunity. Whether a defendant is entitled to qualified immunity is a question of law for the Court to decide. Apostol v. Landau, 957 F. 2d 339, 342 (7th Cir. 1992). It is a two fold determination. First, it must be determined whether defendant's actions were lawful. Secondly, it must be determined whether a reasonable officer could have believed his actions were lawful. Anderson v. Creighton, 438 U.S. 635 (1987).

In his motion for summary judgment defendant Coffey moved for judgment in his favor on the basis of qualified immunity His motion was not granted because factual issues remained as to whether defendant's conduct was objectively reasonable according to Graham v. Connor, 490 U.S. 386, 394 (1989) In Graham the Court held that force used during the course of an arrest, investigatory stop or other seizure violates the Fourth Amendment where it is unreasonable. The reasonableness inquiry in an excessive force case is an objective one. The question is whether officers' actions are objectively reasonable in the light of the facts and circumstances confronting them. This question must be answered from the perspective of a reasonable officer on the scene rather than by hindsight, Id., at 397.

The jury was provided the following instruction:

FOURTH AMENDMENT-EXCESSIVE FORCE

> Plaintiffs assert that defendant Coffey deprived them of the right to be free from unreasonable searches as guaranteed under the Fourth Amendment to the Constitution of the United States. In making a lawful

> arrest a police officer has the right to use such force as is reasonably necessary under the circumstances of each particular case to effect the arrest, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others and whether he is actively resisting arrest or attempting to evade arrest by flight.
>
> Whether or not force used in making an arrest was excessive is an issue to be determined from all the surrounding circumstances. The defendant officer has the lawful authority to use such force in making the arrest as reasonable police officers would believe necessary.
>
> This reasonableness inquiry is an objective one; the question is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation.

The jury found that the force used by Sean Coffey against both plaintiffs was excessive. Based on the instruction they were provided they found that defendant Coffey's conduct as not objectively reasonable.

The Court defers to the jury on this factual determination. The Court next determines whether a reasonable police officer in Officer Coffey's position could have believed that the force he used was constitutional. Plaintiffs bear the burden to establish the existence of a clearly established constitutional right. . Clash v. Beatty, 77 F. 3d 1045, 1047 (7th Cir. 1996).

Plaintiffs contend that a reasonable officer in Coffey's position would have known the use of force was unconstitutional because it was unreasonable according to Graham. In Frazell v. Flanigan, 102 F. 3d 877, 887 (7th Cir. 1996), the Court stated as follows:

> In the circumstances of this case, we agree that the jury's excessive force verdict effectively forecloses Flanigan's immunity defense. Bearing in mind that it was clearly established in 1986 that a police officer would violate the Fourth Amendment by employing excessive force during an arrest (see, e.g., Ellis, 999 F. 2d, at 246), Flanigan would not be entitled to immunity unless he could convince US that it was objectively reasonable at the time for him to believe that his conduct was lawful.

The United States Supreme Court in Wilson v. Layne, 119 S.Ct. 1692, 1699-1700 (1999), addressed qualified immunity in Fourth Amendment case stating that "the right allegedly violated must be defined at the appropriate level of specificity before court can determine if it was clearly established." Using this reasoning, the question in this case is whether a reasonable officer could have believed that using a high risk vehicle contact procedure under the circumstances facing Officer Coffey was lawful in light of clearly established law.

Defendant argues that it was objectively reasonable for him to believe that his conduct was lawful. Officer Coffey chose to implement a high risk vehicle contact procedure when he suspected the plaintiffs of illegal activity and they failed to stop when he attempted to halt their vehicle. Officer Coffey was trained at a State Certified police academy to

perform the high-risk vehicle contact procedure under the circumstances he faced.

In Wilson v. Layne it was claimed that United States marshals had violated Fourth Amendment rights by allowing media into homes when executing arrest warrants The Court held this was a violation of the Fourth Amendment but that the officers were entitled to qualified immunity because the state of the law was not clearly established at the time the search took place. The Court in applying qualified immunity to the conduct of United States marshals stated:

> Finally, important to our conclusion was the reliance by the United States marshals in this case on a Marshal's Service ride-along policy which explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests.

Id. at 1700.

In State v. Richardson, 156 Wis. 2d 128 (1990), the Court held that a high risk vehicle contact procedure including drawn weapons was constitutional where an investigative stop was performed based on reasonable suspicion ot drug activity. In Cuattle v. Tone, 851 F. Supp. 1236 (C.D. Ill. 1994), the court approved felony stop procedures including the use of drawn weapons used by the Illinois State Police.

A reasonable police officer could have believed that the high risk procedure defendant Officer Coffey used was lawful based on the law on December 20, 1997 when force was used in this case. Accordingly, he is entitled to qualified immunity as a matter of law, The judgment will be amended in favor of defendant on the basis of qualified immunity

dismissing plaintiffs' complaint with prejudice and costs.

Since plaintiffs are no longer the prevailing parties their motion for attorney fees will be denied.

Defendant has submitted his costs for discovery and attorney preparation concerning plaintiffs' equal protection claim which was dismissed by plaintiffs when they filed their amended complaint. The Court granted defendant's motion for costs as a condition of allowing plaintiffs to proceed on their tardily filed amended complaint.

Defendant requests $5,281.00 in attorney fees and $3, $3,574.48 in expenses relating to discovery incurred by the Fitchburg Police Department. The expenses are itemized as follows:

$1,618.40	Wages paid to Coffey to prepare responses
238.51	Wages paid to clerk to assist him
561.87	Wages paid to detective to assist him
998.75	for copying 3995 pages of documents
16.00	for duplicating tapes
140.95	for binders

Plaintiffs object to wages paid by the City of Fitchburg for the time spent to prepare responses to discovery requests relating to plaintiffs' equal protection claims which claims were voluntarily dismissed. No justification has been presented under the terms as ordered by the Court to suggest that reimbursement should not be made for these unnecessary

costs. Plaintiff did not receive the binders, and their cost will not be allowed.

Attorney fees of $5,291.00 and expenses of $3,433.53 for a total of $8,714.53 will be awarded.

ORDER

IT IS ORDERED that defendant's motion to alter or amend judgment is GRANTED.

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IT IS FURTHER ORDERED that judgment is entered in favor of defendant Sean Coffey against plaintiffs in the amount of $8,714.53 and DISMISSING plaintiffs' complaint with prejudice and costs.

IT IS FURTHER ORDERED that plaintiffs' motion for attorney fees is DENIED as moot.

Entered this 5th day of January, 2000.

BY THE COURT:
JOHN C. SHABAZ
District Judge